86-1462

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1986

EDWARD POTENZE, PATRICK J. LYNCH, JOHN ESPOSITO and HENRY ANKNER,

Petitioners,

—against—

NEW YORK SHIPPING ASSOCIATION, INC., INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND THE TRUSTEES OF THE GUARANTEED ANNUAL INCOME FUND OF THE NEW YORK SHIPPING ASSOCIATION, INC.—INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

Where an employer violates the provisions of the Age Discrimination In Employment Act by offsetting from an employee benefit plan Social Security retirement benefits for which employees 65 years or over may qualify, may this conduct be excused if the offset results in "significant savings" to the employer?

Where the cost of providing an employee unemployment insurance benefit is the same for all employees, regardless of age, may the employer pay less benefits to employees over 65, solely because they qualify for Social Security?

Did the Second Circuit Court of Appeals abuse its discretion in granting, *sua sponte*, summary judgment to defendants who did not cross-move in the District Court where factual issues exist?

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EDWARD POTENZE, PATRICK J. LYNCH, JOHN ESPOSITO and HENRY ANKNER,

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Opinions and Orders Below

On January 21, 1986, the District Court (Lowe, J.) filed a memorandum opinion and order granting summary judgment to plaintiffs. The decision is not reported (13a).

On March 25, 1986, the District Court entered a judgment awarding damages to the plaintiffs.

On October 31, 1986, the Court of Appeals filed an opinion which reversed the judgment of the District Court and granted summary judgment to the defendants dismissing the complaint on the merits. The decision is reported at 804 F.2d 235 (2d Cir. 1986) (1a).

On December 8, 1986, the Court of Appeals filed an order denying plaintiffs' timely petition for a rehearing.

Jurisdiction

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) (1976). This petition for certiorari is filed within 90 days of the entry of the order denying plaintiffs' timely petition for a rehearing.

Statutory Provisions Involved

Age Discrimination in Employment Act ("ADEA"); 29 U.S.C.A. Section 623(a) (Prohibition of age discrimination)

> (a) Employer practices. It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age:
>
> (2) to limit, segregate, or classify his employees in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.
>
> * * * * *
>
> (f) lawful practices; age and occupational qualifications; other reasonable factors; seniority system; employee benefit plan; discharge or discipline for good cause. It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act (29 U.S. C.S. Sections 621 *et seq.*), except that no such employee benefit plan shall excuse the failure to hire any individual, and no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act (29 U.S.C.S. Section 631(a) because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

Regulations of the Department of Labor, 29 C.F.R., Chapter V, Section 860.120 (Costs and benefits under employee benefit plans).

* * * *

(d) "Subterfuge." In order for a bona fide employee benefit plan which prescribed lower benefits for older employees on account of age to be within the section 4(f)(2) exception, it must not be "a subterfuge to evade the purposes of (the) Act." In general, a plan or plan provision which prescribes lower benefits for older employees on account of age is not a 'subterfuge' within the meaning of section 4(f)(2), *provided that the lower level of benefits is justified by age-related cost considerations.* (The only exception to this general rule is with respect to certain retirement plans. See paragraph (f)(4) of this section.) There are certain other requirements that must be met in order for a plan not to be a subterfuge. These requirements are set forth below. (Emphasis added)

* * * * *

(d)(2)(i) Benefit-by-benefit basis. Adjustments made

on a benefit-by-benefit basis must be in the amount or level of a specific form of benefit for a specific event or contingency. For example, higher group term life insurance costs for older workers would justify a corresponding reduction in the amount of group term life insurance coverage for older workers, on the basis of age. However, a benefit-by-benefit approach would not justify the substitution of one form of benefit for another, even though both forms of benefit are designated for the same contingency, such as death. See Section 860.120(f)(1) of this section.

Federal Rules of Civil Procedure: Rule 56. Summary Judgment

* * * * *

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The action shall beserved at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Statement of the Case

To alleviate the potential widespread unemployment in the longshore industry with the introduction of containerization, a guaranteed annual income benefit (GAI) was negotiated to protect longshoremen.

Pursuant to the terms of the collective bargaining agreement, all longshore persons who are paid at least 700 hours by employer members of the New York Shipping Association (NYSA) during the contract year, who have current active seniority status and who had seniority status as of October 1, 1978 are eligible for GAI benefits. The cost to the employer is the same for all eligible employees regardless of their age.

In 1972, Internal Revenue Service ruled that the GAI Fund was exempt from taxation under Section 501(c)(17) of the Internal Revenue Code as a supplemental unemployment benefit.

In 1979, an Internal Revenue Service Ruling again held that GAI benefits constitute supplemental unemployment benefits and not wages. Therefore, GAI recipients were entitled to collect both GAI and (if eligible) social security retirement income benefits. No social security taxes are paid by the NYSA employers and no social security benefits are accrued by the GAI recipients.

The employer sought to offset the newly available social security income benefit from GAI benefits. An agreement was reached with the union (International Longshoreman's Association, AGL-CIO) and a provision effective said offset was incorporated in the collective bargaining agreement which went into effect, upon ratification, on February 9, 1984. The offset is contained in the following provision:

"IV. SOCIAL SECURITY AUTHORIZATION AND GAI ELIGIBILITY

A). Employees must give full social security authorization to the Trustees of the GAI Fund and execute any and all documents necessary to obtain full social security information to establish eligibility for any GAI benefits. Any employee who had a full time job during any part of the

regular work day shall be disqualified from receiving GAI for the life of the contract.

B). Employees 65 years of age or over who qualify for Social Security shall continue to be eligible for GAI except that, in addition to current contractual deductions, there shall also be deducted the amounts they would have received from Social Security. Such Social Security amounts shall not be used to reduce any hours of eligibility for fringe benefits. Employees over age 70 shall not qualify for GAI.

C). This provision shall be effective only after the signing of this Agreement and no action, other than GAI disqualification, shall be taken with respect to the receiving of any benefits or wages prior to such a date."

The petitioners are four longshoremen, all over age 65, whose GAI benefit have been reduced because they qualified for social security retirement income.

They brought suit in the District Court for violation of the ADEA. In their answers, respondents asserted as affirmative defenses, *inter alia,* (a) that the over 65 employees are better off than all under 65 employees because their net income after taxes is higher and (b) that the GAI Fund is a *de facto* voluntary retirement plan within the meaning of section 4(f)(2) of the ADEA, 29 U.S.C. Section 623(f)(2).

Petitioners moved for summary judgment. No cross-motion for summary judgment was made by respondents. The District Court granted summary judgment to petitioners by a memorandum opinion and order dated January 21, 1986 (13a). The parties stipulated to the amount of damages and a final judgment was entered on March 25, 1986.

The District Court held that the petitioners made out a prima facie case under ADEA by direct proof. Turning to the defenses

asserted, the District Court held that the explanation advanced by the employer for the disparate treatment of the over-65-year olds was unacceptable. The proferred justification for the disparate treatment was held to be a "mere subterfuge" for discrimination (26a).

The Second Circuit Court of Appeals agreed with the District Court that the plan discriminates among recipients on the basis of age (5a). It rejected respondent NYSA's argument that the offset plan does not treat the age 65 group disparately, but rather only seeks to equalize payments between those receiving social security and those not receiving social security (5a). However, the Court of Appeals held that the defense under 4(f)(2) of the ADEA excused the discriminatory practice because respondents had established the defense of 4(f)(2) *as a matter of law* (6a) and dismissed the Complaint on the merits (9a), even though no cross-motion for judgment had been made by respondents in the District Court.

Reasons for Granting the Writ

I.

The federal regulations governing the administration of the ADEA are emasculated by the erroneous finding of the Court of Appeals that it is not a subterfuge to permit social security retirement benefits to be offset against unemployment benefits.

Both the District Court and the Court of Appeals found that the social security offset was discriminatory on its face (20a) and (5a). Both courts erroneously viewed the petitioners' claim to be based solely upon disparate treatment between the over 65 group and the employee group between ages 62 to 65 which also were eligible for reduced social security retirement benefits. Petitioners, however, have always contended that any

social security offset whether it applies to employees over 62 or employees over 65 is discriminatory.*

The District Court rejected the respondents' attempt to rationalize the disparate treatment of the over 65 years olds and held that it was a subterfuge to evade the purposes of the ADEA because better alternatives were available (24a). The Court of Appeals found this to be error and held that the offset was not a subterfuge because the GAI offset results in "significant savings" to the GAI Fund (6a).**

By substituting a rule of "substantial savings" to the employer for the age-related cost considerations as set forth in the federal regulations, the Court of Appeals has emasculated the meaning if the term "subterfuge" as used in the statute and construed by the federal regulations. It injects a dangerous incentive for employers to fashion fringe benefit plans in a discriminatory fashion on the sole justification that significant savings are realized.

The result of this holding by the Court of Appeals shifts the burden and costs to the beleaguered Social Security system for the benefit of employers, who do not contribute to the social security system for the GAI benefits paid.***

The analogy of the Court of Appeals to the "carve out" of Medicare payments from the private health benefit plans underscores the erroneous rationale of the Court (7a-8a). The Medicare carve-out is consistent with the federal regulations because similar benefits are offset, i.e. health benefits. Here the offset of

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*The disparate treatment between these two age groups was raised by petitioners by way of illustration to show that the affirmative defense alleging that over 65 employees were better off than all other employees was not true.

**Respondents assert that the offset results in a savings to the industry and a reduction of the cost of the GAI program by well over $10,000.000.

***GAI employees over 65 are subject to the offset whether or not they apply for the social security income benefit.

a government sponsored retirement benefit (Social Security) is offset against an unemployment benefit provided by the employer. Such a carve-out or offset is expressly rejected by the federal regulations, 29 CFR Section 860.120.

The applicable federal regulations demonstrate that GAI (a supplemental unemployment benefit) is *not* the type of benefit plan which qualifies for the protection of 4(f)(2) of 29 U.S.C. Section 623.

The Court of Appeals misapprehended the application of 4(f)(2) and erroneously held that the offset is not a subterfuge within the meaning of that term as construed by the federal regulations.

In its decision, the Court of Appeals stated: "Plaintiffs argue that GAI is not a bona fide plan because the offset is not justified by age-related cost considerations." (5a) Petitioners do not urge this argument. Petitioners concede that GAI is a bona fide plan because it pays substantial benefits. See *EEOC* v. *Home Insurance Co.*, 672 F.2d 252, 257 (2d Cir. 1982). However, not all bona fide benefit plans come within the shelter of 4(f)(2). Only those plans, where the costs of providing the benefits increase with age, qualify for the exception to ADEA. If there is no age-cost relationship, the reduction in benefits to older workers constitutes a subterfuge as a matter of law. Where the lower level of benefits are not justified by age-related cost considerations 29 CFR 860.160(d) deems such plan a "subterfuge."

No cost data was submitted in the District Court which would show that the cost of providing GAI increases with the age of the employee. On the contrary, the parties agree that all GAI employees, regardless of age, are entitled to the same benefits at the same costs to the employer.

The only reason advanced by the Court of Appeals to support its finding that the respondents have demonstrated age-related cost considerations, *as a matter of law*, is the statement "[h]ere

there can be no doubt that the GAI offset results in significant savings to the fund" (6a).

This rationale of the Circuit Court also is in direct conflict with those federal regulations which expressly state that a benefit package approach is consistent with the purpose of Section 4(f)(2) *only* if it is not used to reduce the cost of the employer. Thus, the reason advanced by the respondents and adopted by the Court of Appeals to justify the offset, i.e. substantial savings to the employer, is deemed a subterfuge under the federal regulations, Section 860.120(d)(2)(ii). *See also EECO* v. *Great Atlantic and Pacific Tea Co.,* 618 F.Supp. 115 (D.C. Ohio 1985) where the Court held at P. 122:

> "Denying severance pay to employees 55 years of age and older indeed *saved money* for the defendants, but only because it arbitrarily discriminated on the basis of age in violation of the ADEA." (Emphasis added)

The federal regulations covering costs and benefits under employee benefit plans, 29 CFR Chapter V, Section 860.120, are, therefore, negated by the Court of Appeal's erroneous ruling. If this ruling is allowed to stand, it will have a profound effect not only on the applicable federal regulations but on all employee benefit plans offered to older employees, who are protected by ADEA.

II.

The Second Circuit's holding is also in direct conflict with other circuit courts which have treated the issue and is predicated on an erroneous reading of cases in its own court.

Other circuit courts which have treated the issue have squarely found that the 4(f)(2) defense is not available to an employer

unless it is demonstrated that the cost of benefits increases with age.

The Third Circuit held in *EEOC* v. *Westinghouse Electric Corp.*, 725 F.2d 211 (3rd Cir. 1983), *cert. denied* 105 S.Ct. 92 (1984) that fringe benefit plans unrelated to the age-cost factor are not included in the 4(f)(2) exception. *Westinghouse* involved a layoff income benefit analogous to GAI.

Similarly, the Fifth Circuit in *Alford* v. *City of Lumbock, Texas,* 664 F.2d 1263 (5th Cir. 1982), *cert. denied* 456 U.S. 975 (1982) held that the 4(f)(2) defense was unavailing where sick leave benefits were denied employees by reason of age.

Westinghouse and *Alford* are consistent with the federal regulations and the legislative intent of Congress which permits age distinctions to be made in benefit plans where age significantly increases the cost of providing the benefits. *See EEOC* v. *Great Atlantic and Pacific Tea Company,* 618 F.Supp. 115 (D.C. Ohio).

Indeed, prior Second Circuit decisions were in conformity with *Westinghouse* and *Alford.* In *Cipriano* v. *Board of Education of City School District,* 785 F.2d 51 (2nd Cir. 1986) Judge Friendly noted, with approval, that in *Alford* and *Westinghouse* the 4(f)(2) defense was properly denied where the fringe benefits involved were not functionally related to or generically qualified for such protection.*

The Circuit Court (Mahoney, J.) is not only in conflict with other circuit courts but has refused to follow or has misapprehended, the instructions of Judge Friendly in *Cipriano.*

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*The *Cipriano* case involved a retirement plan which was challenged as a subterfuge under 4(f)(2). The *Cipriano* court declined to rule on this issue and chose to await the issuance of EEOC guidelines on the meaning of subterfuge. Upon information and belief, EEOC has not yet issued its guidelines and continues to apply the Department of Labor guidelines promulgated under 29 CFR Chapter V. Section 860.120.

The erroneous holding of the Second Circuit, therefore, is in conflict with other circuit courts which have treated the issue. The Second Circuit's ruling will have far-reaching impact on the structuring of employee benefit plans, if an offset of government benefits is permitted in private plans unrelated to the government benefit.

III.

Unbridled discretion by the Second Circuit to grant summary judgment is contrary to the Federal Rules of Civil Procedure and is a dangerous precedent.

In addition to reversing the summary judgment in favor of the petitioners in the District Court, the Court of Appeals, *sua sponte*, granted summary judgment in favor of the respondents and dismissed the complaint on the merits (9a). This is a harsh result, given that respondents never moved for summary judgment on the basis of their affirmative defense based upon Section 4(f)(2) and that petitioners, consequently, never addressed such a motion.

In point of fact, petitioners never fully litigated the issues below. For example, the age cost factors, which the Court of Appeals deemed defendants to have established as a "matter of law," did not appear in the record. Indeed, the only data remotely relating to "costs" dealt with the tax consequences after payment of GAI and Social Security benefits. No cost data, as required in 29 CFR 860.120(d)(3), was ever presented.

This Court granted a petition for certiorari in *Fountain* v. *Filson*, 336 U.S. 681, 69 S.Ct. 754 (1949) and ruled that it was improper to grant a motion for summary judgment on an issue which the opposing party did not have an opportunity to present before the trial court. The Court reasoned, at P. 683, that to allow same would mean that "the party who had won in the

trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered in his case."

The Court of Appeals abused its discretion in being the first and last arbiter of an issue which it raised of its own accord, without resort to a true adversarial process. Its actions were unnecessary and contrary to the spirit of Federal Rules of Civil Procedure and the view of this Court.

Conclusion

For these reasons, a writ of certiorari should issue to review the mandate of the United States Court of Appeals for the Second Circuit in *Potenze* v. *New York Shipping Association.*

Dated: New York, New York
March 6, 1978

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1420—August Term, 1985
(Argued: June 11, 1986 Decided: October 31, 1986)
Docket No. 86-7266

EDWARD POTENZE, PATRICK J. LYNCH, JOHN ESPOSITO and HENRY ANKNER,

Plaintiffs-Appellees,

—v.—

NEW YORK SHIPPING ASSOCIATION, INC., INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND THE TRUSTEES OF THE GUARANTEED ANNUAL INCOME FUND OF THE NEW YORK SHIPPING ASSOCIATION, INC.-INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Defendants-Appellants.

Before:

OAKES, ALTIMARI, and MAHONEY,

Circuit Judges,

Appeal from a judgment of the Southern District of New York (Lowe, *Judge*), granting summary judgment to plaintiffs in an Age Discrimination in Employment Act action against the defendants New York Shipping Association, International Longshoremen's Association, AFL-CIO, and the Trustees of the Guaranteed Annual Income Fund of the New York Shipping Association, Inc.-International Longshoremen's Association, AFL-CIO.

Reversed and complaint dismissed.

DONATO CARUSO, New York, New York (Lambos, Flynn, Nyland & Giardion, New York, New York), *for Defendants-Appellants New York Shipping Association, Inc., and Trustees of the NYSA-ILA GAI Fund.*

ERNEST MATHEWS, New York, New York (Thomas W. Gleason, New York, New York), *for Defendants-Appellants International Longshoremen's Association, AFL-CIO and Trustees of the NYSA-ILA GAI Fund.*

JAMES SULLIVAN, New York, New York (Sullivan, Marshall & McKeegan, New York, New York), *for Plaintiffs-Appellees.*

MAHONEY, *Circuit Judge*:

Plaintiffs are longshoremen employed by the New York Shipping Association ("NYSA"). The collective bargaining agreement between their union and the NYSA created the "Guaranteed Annual Income" ("GAI") plan to mitigate the widespread unemployment that accompanied the use of containers in shipping. GAI creates a minimum annual income by supplementing wages and governmental benefits, such as unemployment, up to a guaranteed minimum amount, now between $33,000 and $36,000. Benefits end at age 70. Over time, the program's cost has increased dramatically, causing the NYSA to negotiate for cost reductions.

The Internal Revenue Service ("IRS") originally took the position that GAI was a supplemental unemployment compensation benefit, but was subject to Social Security taxes. Accordingly, longshoremen receiving GAI could not receive Social Security income ("SSI"). In 1979, however, the IRS held that

GAI was not subject to federal employment taxes, including the Social Security tax, making longshoremen eligible for SSI.

The NYSA sought to offset the newly available SSI from the GAI benefits. An agreement was reached with the union providing that:

> Employees 65 years of age or over who qualify for Social Security shall continue to be eligible for GAI except that, in addition to current contractual deductions, there shall also be deducted the amounts they would have received from Social Security. . . .

Under the Social Security law, payments may begin either at age 62 or 65. If, however, the recipient opts for payments to commence at age 62, the amount of each payment is reduced. Thus, if the GAI plan offset SSI at age 62, the payee would either have to accept less current income for greater later income (subtracting the potential SSI from GAI from age 62 to 65, but only accepting SSI at age 65), or accept the same total income between ages 62 and 70, and a lesser income after age 70 (subtracting actually received SSI from GAI from age 62 to 65, but getting only the smaller SSI payments in the period after age 70 when GAI payments end).

Plaintiffs, all over age 65, claim that the offset provision quoted above violates the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982) ("ADEA") because it allows persons between ages 62 and 65 to receive full GAI benefits plus any social security benefit opted for (giving those who opt for SSI at age 62 a windfall for those three years),[1]

[1]Note that this windfall, as indicated earlier, carries with it the price tag of reduced SSI payments after age 70. Note further that if an age 62-65 employee nonetheless elects to receive SSI commencing at age 62, his combined benefits from ages 62-65 will exceed those of both older and younger recipients of GAI.

while offsetting SSI benefits from GAI payments to those over age 65.

In granting plaintiffs' motion for summary judgment, the District Court held that plaintiffs showed a *prima facie* case under the ADEA, because the offset treated employees over 65 differently than those age 62-65,[2] and that defendants did not establish a defense under section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2) (1982), of which more later.

Section 4(a) of the ADEA provides in part:

> It shall be unlawful for an employer—
>
> (1) to fall or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . .

29 U.S.C. § 623(a) (1982).

Under the ADEA, " '[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all.' " *Trans World Airlines, Inc* .v. *Thurston,* 469 U.S. 111, 121 (1985) (quoting *Hishon* v. *King & Spalding,* 467 U.S. 69, 75 (1984). In *Thurston,* TWA pilots who became disqualified from serving as pilots for reasons other

[2]But see *supra* note 1.

than age automatically displaced less senior flight engineers. However, pilots disqualified upon reaching retirement age were not automatically given the flight engineer positions, though the pilots usually got the positions. *Id.* at 621 & n.15. The court held that a *prima facie* case existed because "the method of transfer available to a disqualified captain depends upon his age." *Id.* at 622.

The NYSA argues that the offset plan does not treat the age 65 group disparately, but rather only seeks to equalize benefit payments between those receiving SSI and those not receiving SSI. It nonetheless is a plan which discriminates among recipients on the basis of age. This is probably all that *Thurston* requires.

Appellant also relies, however, on section 4(f)(2) of the ADEA, which provides in part:

> It shall not be unlawful for an employer, employment agency, or labor organization . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter. . . .

29 U.S.C. § 623(f)(2) (1982).

This defense requires the employer to prove that a bona fide benefit plan exists, that the action at issue is taken in observance of the plan's terms, and that the plan is not a subterfuge to evade the purposes of the ADEA. *EEOC* v. *Home Insurance Co.*, 672 F.2d 252, 257 (2d Cir. 1982).

1. *Bona Fide Benefit Plan*

Plaintiffs argue that GAI is not a bona fide plan because the offset is not justified by age-related cost considerations. We reject this contention because, to the extent such considerations

must be proven, *see Cipriano* v. *Board of Education*, 785 F.2d 51, 54 (2d Cir. 1986) (rejecting argument that section 4(f)(2) is available only when "actuarially significant" cost considerations are proven but noting presence of significant cost considerations in early retirement incentive plans); *but cf. EEOC* v. *Home Insurance Co.*, 672 F.2d 252, 257 (2d Cir. 1982) (parties stipulated that plan was bona fide "because . . . employees who retired pursuant to its terms received substantial benefits"); *Marshall* v. *Hawaiian Telephone Co.*, 575 F.2d 763, 765 (9th Cir. 1978) ("parties conceded that the plan was bona fide in the sense that it existed and paid benefits"), appellants have done so as a matter of law. Here there can be no doubt that the GAI offset results in significant savings to the fund. And as Judge Friendly reasoned in *Cipriano*:

> "For the purpose of determining whether a plan is a 'bona fide employee benefit plan' within the meaning of § 4(f)(2), it is immaterial that a more nicely tailored plan [might have distributed the cost savings more evenly among various age groups]. The way the plan is structured affects only whether it might be a subterfuge to evade the purposes of the Act, not whether it qualifies generically for the shelter of § 4(f)(2)."

785 F.2d at 55.

2. *Subterfuge*

A subterfuge under the Act is, in its ordinary dictionary sense, "a scheme, plan, stratagem, or artifice of evasion." *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 203 (1977). This requires some showing of intent, *see id.*, or, to rebut intent, a showing by the defendant of non-age, based reasons for the plan. *See Cipriano*, 785 F.2d at 57-58; *EEOC* v. *Home Insurance Co.*, 672 F.2d 257, 258-59, 260 (2d Cir. 1982). The plan need not be the best available plan, though obviously if it

is not, the proffered reasons for the structure of the plan will have less force. *Cipriano,* 785 F.2d, at 55; *see also Home Insurance Co.,* 672 F.2d at 263 (rejecting defendant's reasons as specious, unrelated to the plan, and illegal under the ADEA).

The District Court held that the GAI-social security offset was a subterfuge to evade the purposes of the ADEA, because better alternatives were available.[3] This was error.

GAI is designed to provide only a minimum income. Offsetting SSI at age 65 furthers that goal. Offsetting SSI at age 62 would cause recipients either to forego the amount of the SSI between ages 62 and 65 (if the beneficiary chose not to receive SSI) or to receive less SSI past age 70 (if the beneficiary chose to receive SSI commencing at age 62). Thus, the plan equalizes the effect of the 1979 IRS ruling while avoiding windfall benefits to older members of the union.

Moreover, the offset is in line with the theme of regulations adopted by the Department of Labor in implementation of the ADEA with respect to offsets of Medicare benefits (a social security program) against payments made pursuant to private health benefits plans. The pertinent regulation provides:

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[3]The lower court rejected defendant's position that initiating the offset at age 65 was a non-violative protection of the longshoremen's post-70 SSI. The asserted reason for the offset was not found to be unrelated to the plan, or to be specious, *see Home Insurance Co.,* 672 F.2d at 263 (rejecting defendant's rationale as either unrelated to the plan, specious, or illegal under the ADEA); rather, the court simply held that the alleged justification was "somewhat disingenuous." Memorandum Op. at 18. It was noted that a beneficiary receiving SSI between ages 62 and 65 could save and invest that money and "build a considerable res by the time he reached 70. These proceeds *may* well compensate for any reduced Social Security benefits after age 70." *Id.* at 18 n.* (emphasis added).

> An employer does not violate the Act by permitting certain benefits to be provided by the Government, even though the availability of such benefits may be based on age. For example, it is not necessary for an employer to provide health benefits which are otherwise provided to certain employees by Medicare. However, the availability of benefits from the Government will not justify a reduction in employer-provided benefits if the results is that, taking the employer-provided and Government-provided benefits together, an older employee is entitled to a lesser benefit of any type (including coverage for family and/or dependents) than a similarly situated younger employee. For example, the availability of certain benefits to an older employee under Medicare will not justify denying an older employee a benefit which is provided to younger employees and is not provided to the older employee by Medicare.

29 C.F.R. § 860.120(e) (1985); *see also id.* §860.120(f)(ii)(A) (Medicare payments may be "carved out" from an existing health insurance plan, which then pays only those benefits which are not paid for by Medicare); *id.* § 860.120(f)(ii)(B) (outlining procedure for such a carve-out).

Plaintiffs, however, urge us to adopt the position that in implementing an SSI offset, NYSA must force its employees to accept lesser social security payments after age 65 (although economic detriment would be deferred until age 70 because of compensating GAI payments), or to accept lesser benefits from age 62 to 65. Both alternatives would be unacceptable. The latter would give the employee less total benefits due to his age. The former would impair the employee's later government benefits in order to maintain his present employment benefits, an indirect way to accomplish the same deprivation. Accordingly, we conclude that the statutory interpretation for which plaintiffs

contend, and which was adopted below, would in practical effect operate to frustrate the purposes of the ADEA.

3. *Conclusion*

Summary judgment decided on submission is subject to plenary, *de novo* review. *See Doe* v. *New York University*, 666 F.2d 761, 765 (2d Cir. 1981). This court also has the power in appropriate circumstances to reverse the district court's grant of summary judgment and to grant summary judgment for the nonmoving party. *See Ithaca College* v. *NLRB*, 623 F.2d 224, 229 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); *Abrams* v. *Occidental Petroleum Corp.*, 450 F.2d 157, 165-66 (2d Cir. 1971), *aff'd sub nom. Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582 (1973); 6 Moore's Federal Practice ¶ 56.12. This is appropriate when the issues have been fully developed, the opponent has had a full and fair opportunity to litigate the question, and no new facts would be developed on remand. *Compare Ithaca College*, 623 F.2d at 229 (summary judgment not granted because issue not addressed below) *with Abrams*, 450 F.2d at 165-66 (summary judgment granted to nonmoving party because briefs showed nothing to suggest remand would be appropriate and "inqury at the argument failed to reveal any new facts that might be adduced by [appellees] at an evidentiary hearing").

Because the only issue remaining, whether the challenged action was taken in accordance with the plan, is not in dispute and is clear from the submissions on appeal, we reverse the court's grant of summary judgment and grant summary judgment for the defendants-appellants.

Reversed and the complaint is dismissed on the merits.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31st day of October, one thousand nine hundred and eighty-six.

Present: HON. JAMES L. OAKES
HON. FRANK X. ALTIMARI
HON. J. DANIEL MAHONEY
Circuit Judges,

No. 86-7266

EDWARD POTENZE, PATRICK J. LYNCH, JOHN ESPOSITO and HENRY ANKNER,
Plaintiffs-Appellees,

—v.—

NEW YORK SHIPPING ASSOCIATION, INC., INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND THE TRUSTEES OF THE GUARANTEED ANNUAL INCOME FUND OF THE NEW YORK SHIPPING ASSOCIATION, INC.-INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment of the Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed and the complaint be and it hereby is dismissed on the merits.

ELAINE B. GOLDSMITH, Clerk

By: EDWARD J. GUARDARO,
Deputy Clerk

(SEAL)

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON
12-8-86

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the Unied States Courthouse, in the City of New York, on the 8th day of December, one thousand nine hundred and eighty-six.

Present: HON. JAMES L. OAKES,
HON. FRANK X. ALTIMARI,
HON. J. DANIEL MAHONEY,
Circuit Judges.

No. 86-7266

EDWARD POTENZE, PATRICK J. LYNCH, JOHN ESPOSITO and HENRY ANKNER,

Plaintiffs-Appellees,

—v.—

NEW YORK SHIPPING ASSOCIATION, INC., INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND THE TRUSTEES OF THE GUARANTEED ANNUAL INCOME FUND OF THE NEW YORK SHIPPING ASSOCIATION, INC.-INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Defendants-Appellants.

A petition for rehearing having been filed herein by counsel for the plaintiffs-appellees, Edward Potenze, Patrick J. Lynch, John Esposito and Henry Ankner,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

MARCIA C. MAKAR, Deputy Clerk
for:
ELAINE B. GOLDSMITH
Clerk

Filed Dec. 8, 1986.

Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 3972 (MJL)

EDWARD POTENZE, et al.,

Plaintiffs,

—against—

NEW YORK SHIPPING ASSOCIATION, INC., et al.,

Defendants.

APPEARANCES:

Counsel for Plaintiff:

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MARY JOHNSON LOWE, D. J.

This is an action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §6621. Presently before the Court are defendants' motion to compel discovery and plaintiffs' motion for summary judgment. For the reason stated below we

grant summary judgment to the plaintiffs. Defendants' motion to compel discovery is denied as moot.*

Background

The plaintiffs are members of the International Longshoremen's Association ("ILA") and were employed by the New York Shipping Association ("NYSA"). As members of the ILA, pursuant to their collective bargaining agreement, they are entitled to what is called "Guaranteed Annual Income" ("GAI"). This action challenges the practice of offsetting the GAI benefits with Social Security benefits.

The GAI program has its roots in the container revolution that swept the cargo shipping industry. In response to displacement of longshoremen caused by automation of the industry, the ILA bargained for, and received, the GAI program. Under the program, longshoremen who are ready, willing and able to work, but for whom no work is available, are paid regardless of the fact that they did no work. Historically, work assignments in the industry were given out on a seniority basis; however, in order to avoid the anomaly that workers with high seniority would have to work while junior members could sit-back and collect GAI, a two-step hiring process was adopted.

Under this system, work is offered to longshoremen first on a voluntary basis starting with the highest seniority classification —"A" seniority. If all available jobs are not filled, the second or involuntary phase of hiring begins. In this involuntary phase, work assignments are offered starting with the lowest seniority category—"I" seniority (Dickman Aff. ¶5). Should a long-

*Because we grant the motion for summary judgment we need not reach the discovery motion however, the case will be referred to a Magistrate to calculate damages. The Magistrate may order whatever discovery he or she deems appropriate for that purpose.

shoreman refuse work during this hiring phase, he is charged with a "debit" or penalty to his GAI record (Fier Aff. ¶33). Three such penalties result in a one-year disqualification from the right to receive GAI.

GAI currently provides to every eligible longshoreman who is ready, willing and able to work, but for whom no work is available, the equivalent of up to 2,080 hours of straight-time pay per year multiplied by the applicable hourly rate. That rate is now $16.00 per man-hour. Thus, every longshoreman ready, willing and able to work, regardless of age or the availability of work, is guaranteed a minimum income of $33,280 per year as of October 1, 1984—the start of the 1984-85 contract year.*

As the cost of GAI skyrocketed, the NYSA demanded cost containment programs.** As part of the cost containment program it was agreed that GAI benefits should be offset by unemployment insurance. (Fier Aff. ¶21). The question of offsetting Social Security payments against GAI, however, did not arise until recently. The Internal Revenue Service ("IRS") had taken the position that GAI was a "wage or remuneration." Thus, longshoremen receiving GAI were not eligible for Social Security. However, in 1979, the IRS ruled that GAI was not a wage, but rather it was supplemental unemployment insurance. Because of this ruling it became possible for longshoremen to receive both GAI and Social Security.

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*In fact, when vacation and holiday time and what is referred to as the "container royalty" are added, the figure is close to $36,000.

**Since its inception, GAI has cost the port of New York more than $750,000,000. In the 1982-83 contract year, GAI accounted for over $77,000,000 of the more than $220,000,000 of costs for benefits to longshoremen for that year. During the three contract years October 1, 1980 through September 30, 1983, GAI cost the port in excess of $189,000,000 (Fier Aff. ¶s 34-36; Dickman Aff. ¶ 6).

In the most recent contract negotiations between the NYSA and the ILA, the NYSA argued that all Social Security benefits should be offset from the GAI benefits. Eventually an agreement was reached which stated:

> Employees 65 years of age or over who qualify for Social Security shall continue to be eligible for GAI except that, in addition to current contractual deductions, there shall also be deducted the amounts they would have received from Social Security. Such Social Security amounts shall not be used to reduce any hours of eligibiilty for fringe benefits.

(Article IV of NYSA-ILA Settlement of Collective Bargaining Disputes).

The plaintiffs claim that this provision unlawfully discriminates against them on the basis of age in that it offsets Social Security benefits from GAI for persons over 65 while allowing persons age 62-65 to continue to receive GAI without any deduction for the Social Security benefits they may receive.* Specifically, they argue that it violates ADEA.

The defendants raise several defenses. First, they argue that ADEA does not apply to GAI. Second, they argue that offset of Social Security benefits does not violate the Act and that §4(f)(2) of ADEA, 28 U.S.C. §623(f)(2), provides a defense. Finally, they argue that factual disputes preclude summary judgment.

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*Pursuant to the Social Security Law, 42 U.S.C. §415, a covered individual may elect to receive Social Security at age-62 rather than age-65, however, the amount of the Social Security benefit will be reduced for the remainder of the individual's life.

Discussion

(a) *Applicability of ADEA*

As a threshold issue defendants argue that ADEA does not apply to GAI. Section 4(a) of ADEA, 29 U.S.C. §623(a), states:

> (a) It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.
>
> * * *

29 U.S.C. §623(a).

The defendants argue that GAI is neither "compensation" nor a "term, condition, or privilege of employment". Therefore, they conclude GAI does not fall within the purview of ADEA.

The defendants begin with the argument that the IRS ruling that GAI is not a wage bars the claim that it is "compensation" within the meaning of ADEA. They go on to argue that GAI does not fall within the "terms condition, or privilege of employment" language of the statute. Their apparent rationale for this argument is that GAI is paid as a result of the longshoreman's unemployment rather than his employment. They argue:

> GAI is not paid in recognition of work performed for the employer. It is paid in recognition of and as a result of the disappearance of work.

Defendants' brief at 13. They contend that GAI is not a privilege of employment and therefore is beyond the ambit of the statute.

We find little merit in defendants' argument. The defendants' claim that GAI is not a "term, condition, or privilege of employment" has no support in law or fact and is belied by the plain language of the statute. In light of the liberal construction given to ADEA, *see, Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 193 (3rd Cir. 1978), *cert. denied*, 439 U.S. 821 (1979), we must conclude that GAI is regulated by ADEA.

The defendants do not contend that GAI is paid to anyone who does not or did not work for the NYSA. The only people eligible to receive GAI are those who are parties to the collective bargaining *employment* contract. Moreover, in order to receive GAI the Longshoreman must be ready, willing, and able to work and must forsake other "off-pier" employment. GAI is certainly a product of the employment contract and thereby a term, condition, or privilege of employment for purposes of ADEA.

In this regard we find the recent Supreme Court case of *Trans World Airlines Inc.* v. *Thurston*, 105 S. Ct. 613 (1985) (hereinafter *"TWA"*) instructive. In that case pilots for Trans World Airlines ("TWA") were allowed to "bump" more junior flight engineers if they were no longer needed as pilots, however, if the pilot reached the mandatory retirement age for pilots of 60 the pilot could not "bump" a flight engineer even though the retirement age for engineers was seventy. The Court held that "bumping" was a privilege of employment. Justice Powell, delivering the opinion of the Court wrote:

> Under TWA's transfer policy, 60-year-old captains are denied a "privilege of employment" on the basis of age. Captains who become disqualified from serving in that position for reasons other than age automatically are able to displace less senior flight engineers. Captains disqualified

> because of age are not afforded this same "bumping" privilege.
>
> * * *
>
> [I]f TWA does grant some disqualified captains the "privilege" of "bumping" less senior flight engineers, it may not deny this opportunity to others because of their age.

TWA, 105 S. Ct. at 621.

Like GAI, the privilege of "bumping" is by definition exercised by employees for whom work is not available. We must conclude that GAI is a privilege of employment within the meaning of ADEA.* *Cf., EEOC* v. *Westinghouse Elec. Co.*, 725 F.2d 211, 219 (3rd Cir. 1983) (Higginbothan, J.).

(b) *Prima Facie Case Under ADEA*

Having concluded that ADEA does apply to GAI, the inquiry turns to whether the undisputed facts make out a *prima facie* case under ADEA. While the so-called "McDonnell Douglas test", *see McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), for a *prima facie* case in Title VII, 42 U.S.C. §2000-e, actions may be used by analogy in ADEA cases, the Second Circuit has made it clear that "[w]here direct proof [of age discrimination] is available, there is no reason to 'adhere stubbornly to [McDonnell Douglas'] specific formulae.' " *Hagelthorn* v. *Kennecott Corp.*, 710 F.2d 76, 81 (2d Cir. 1983), *quoting, Grant* v. *Bethelehem Steel*, 635 F.2d 1007, 1014 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981). The Supreme Court in *TWA* said:

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*We note that were we to accept the defendants' restricted view of privileges of employment, Title VII of the Civil Rights Act of 1964 would aiso not apply to GAI. Title VII uses the exact same "terms, conditions, or privileges of employment" language as ADEA, yet defendants could not seriously argue that they could deny GAI to longshoremen who are black. *Compare* 42 U.S.C. §2000-2 *with* 28 U.S.C. §623.

> The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the "plaintiff [has] his day in court despite the unavailability of direct evidence." *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1014 (CA1 1979). In this case there is direct evidence that the method of transfer available to a disqualified captain depends upon his age. Since it allows captains who become disqualified for any reason other than age to "bump" less senior flight engineers, TWAs transfer policy is discriminatory on its face.

104 S. Ct. at 622. The Court held that the *McDonnell Douglas* test was "inapplicable" when there is direct evidence of age discrimination. *Id.*

It is undisputed in the case at bar that the NYSA-ILA agreement treats those over 65 differently than those between the ages 62 and 65. On its face the agreement says "Employees 65 years of age or over . . ." (See Section IV(b) of the agreement (Defendants Exh. 1 in Opposition)). This agreement is direct evidence of disparate treatment based on age as noted in *TWA*. Therefore, we conclude that plaintiffs have established by undisputed fact a *prima facie* case.

(c) *Defense*

Having concluded that a *prima facie* case has been established, the inquiry turns to whether a defense can be established.* The

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*Defendants argue that 29 U.S.C. §623(f)(2) bars plaintiffs' ADEA claim. Section 623(f)(2) states:

> It shall not be unlawful for an employer, employment agency, or labor organization. . . to observe the terms of a bona fide senority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purpose of this chapter.

29 U.S.C. §623(f)(2).

(Footnote continued on following page)

defendants begin by arguing that the Social Security offset is not illegal. They go to great pains to explain why the offset is needed to contain the costs of GAI. They also point out that the plaintiffs' after tax income is actually higher, even with the offset, than the income of a younger longshoreman. This occurs because the Social Security benefits are not taxed or taxed at a substantially reduced rate when compared with regular income.** Thus a 50-year-old longshoreman would receive the same gross income as a 66-year-old longshoreman, however, the 66-year-old would have more after-tax income because part of his income was derived from Social Security.

While defendants' points are quite true, they do nothing to advance the case. We completely agree that the offset is not *per se* illegal. To the contrary, the offset seems to be a singularly rational attempt to contain what is one of the so-called featherbeds" left in our economy. Likewise their point in regard to after tax income is true, but the flaw in defendants' reasoning remains. Plaintiff's claim is not that the offset is illegal *per se*,

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(Footnote continued from previous page)

The Second Circuit has held that there are three elements to a §623(f)(2) defense: (1) the existence of a bona fide bnefit plan; (2) that the action complained of was taken in observance of the plan's terms; and (3) that the plan was not a subterfuge to evade the purposes of ADEA. *EEOC* v. *Home Insurance Co.*, 672 F.2d 252, 257 (2d Cir. 1982). In this case, discussion of the first two elements is unnecessary, since defendants own rational for the discriminatory practices, even accepted as true, failed to prove that the GAI program is not a subterfuge to evade the purposes of the ADEA.

**Depending on the amount of other incame a taxpayer has, the maximum taxable portion of the Social Security benefit is 50%, however, in most cases less than 50% of Social Security benefits are taxable. For good discussion of the taxability of Social Security benefits, *see*, I.R.S. Publication 915. *Tax Information on Social Security Benefits (and Tier 1 Railroad Retirement Benefits)*, (IRS, Social Security Administration, Railroad Retirement Board).

but rather that it is applied in a discriminatory fashion. The question then is not whether the offset is illegal, but rather is the disparate treatment between the longshoremen ages 62-65 and the longshoremen over-65 illegal? Likewise the question is not whether the 66-year-old takes home more than the 50-year-old, but rather does the 66-year-old take home more than the 63-year -old? Both of these questions must be resolved against the defendants.

ADEA does not substantively dictate what benefits must be granted. Its purpose is solely to assure that age is not used as a basis for discrimination. The germane inquiry is whether people of all ages are treated equally. As the Court in *EEOC* v. *Air Line Pilots Assoc. Int.*, 489 F. Supp. 1003 (D. Minn. 1980), *rev'd. on other grounds*, 661 F.2d 90 (8th Cir. 1981) stated:

> [I]t is irrelevant whether older employees receive lesser benefits than in the past; the relevant inquiry rather is whether older employees receive lesser benefits than younger employees, and if so, why.

Id. at 1005. In the case at bar it is undisputed that members of the older age group are treated differently than members of a younger group.

The NYSA and ILA may agree to offset Social Security but they must do it in a non-discrimatory way. They could offset all Social Security benefits of all members, they could offset half of all members' Social Security or for that matter they could offset the container royalty from all members' GAI; what they may not do is discriminate. As the Supreme Court stated in *Hishon* v. *King & Spalding*, 467 U.S. 69, 104 S. Ct. 2229, 2234 (1984), "[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatoiry fashion, even if the employer would be free . . . not to provide the benefit at all." Similarly in *TWA* the Court held, "[t]he Act does not require

TWA to grant transfer privileges to disqualified captains. Nevertheless, if TWA does grant some disqualified captains the 'privilege' of 'bumping' less senior flight engineers, it may not deny this opportunity to others because of their age." 105 S. Ct. at 621.

It is undisputed that Social Security is only offset from the GAI of longshoremen over-65. Although it is true that the longshoremen over-65 actually receive more take-home income than longshoremen who receive only GAI, it is also undisputed that a longshoreman between 62 and 65 who elects to take Social Security receives a significantly higher gross and net income than a longshoreman over-65. This, of course, occurs because the 62 to 65 year-old receives his GAI undiminished by a Social Security offset *as well as* Social Security.

The defendants attempt to rationalize the disparate treatment of the over-65-year-olds. In their brief they argue:

> Plaintiffs make a much ado about the fact that the offset provision does not apply to longshoremen between the ages of 62 and 65 who are eligible for early Social Security payments. However, there was a sound and equitable reason for not applying the provision to these longshoremen. There was concern that application of the mandatory offset provision to these longshoremen would force them to file for Social Security benefits at an early age, and thus they and their spouses would receive substantially reduced monthly Social Security benefits for life (Dickman Aff. ¶12). As to those longshoremen between the ages of 62 and 65 who have already elected to take early Social Security, NYSA and ILA agreed no offset would occur since these longshoremen already had compromised their lifetime income and that of their spouses by accepting reduced payments from the government (Dickman Aff. ¶12).

Defendants brief at 18-19.

This explanation is unacceptable. ADEA bars age based discrimination. That the plaintiff's employer and union agreed to such discrimination is irrelevant. A union may not waive an individual's rights under ADEA. *EEOC* v. *County of Calumet*, 686 F.2d 1249, 1256 (7th Cir. 1982).

Defendants' claim that the longshoremen who elected early Social Security have somehow "compromised" their lifelong earnings is somewhat disingenous. Between ages 65 and 70 all longshoremen will have the same gross income regardless of whether they elected to accept Social Security at age 62.* While it is true that the longshoremen who elected early Social Security will receive smaller Social Security payments, the amount of the GAI offset will likewise be reduced. Thus, GAI will automatically compensate for the reduced Social Security earnings. Notwithstanding this fact we believe the ILA and NYSA may agree to some reasonable provision to protect the longshoremen who have elected to accept Social Security at age 62. They may not, however, do this in a discriminatory manner. Their actions must be rationally based and may not perpetuate the discrimination unnecessarily. They could for example, "grandfathered" those workers who have already elected to accept early Social Security. Under such a system the longshoremen who elected to receive early Social Security would not be affected by the offset until they reached age 65. Alternatively, the effective date of the offset program could have been delayed for three years.

Generally, when discrimination is found in a Title VII or

*Because of the tax-treatment of Social Security benefits, the longshoremen electing early Social Security will have slightly lower net income. We note, however that under the present arrangement it appears to be advantageous to accept early Social Security. By accumulating the benefits received between ages 62 and 65 and investing them appropriately (*e.g.* tax-free municipal bonds) the longshoreman could build a considerable res by the time he reached 70. These proceeds may well compensate for any reduced Social Security benefits after age 70.

ADEA case, the District Court is under an affirmative duty to issue an injunction. *Evans* v. *Harnett County Board of Education,* 684 F.2d 304, 306 (4th Cir. 1982); *Grove* v. *Frostburg Nat. Bank,* 549 F. Supp. 922, 945 (D. Md. 1982); *But see, Cancellier* v. *Federated Department Stores,* 672 F.2d 1312, 1319 (9th Cir. 1982). While we agree that injunctions are normally appropriate in cases of discrimination, we believe that in this case no injunction is warranted. As the Supreme Court held in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 416 (1975) the Court must exercise equitable discretion to serve the purpose of the act. The Court reinforced the discretionary nature of the relief while warning that "[i]mportant national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' " *Id.* at 417, *quoting, Moragne* v. *States Marine Lines,* 398 U.S. 375, 405 (1970).

In the instant case we believe that the purpose of the Act would be frustrated by an injunction. The discrimination charged in the complaint is insular. There is no allegation, much less evidence, of more widespread age discrimination in the longshoreman industry. The principle of *res judicata* will protect against the precise type of discrimination present here. An injunction, however, may have the effect of unnecessarily restricting the options available to the defendants. The defendants—plaintiffs' employer and union—must be allowed to negotiate in good faith. As noted previously, the offset is not *per se* illegal. The defendants may agree to a nondiscriminatory offset policy.

We exercise our discretion not to issue an injunction based on our belief that the defendants will, in good faith, eliminate the present discriminatory aspects of the offset.* We do, of course,

*Should the defendants fail to remedy the discriminatory elements of the offset program, the plaintiffs may petition the Court to enter an injunction.

order that the amounts heretofore offset from plaintiffs' GAI be prepaid with prejudgment interest. Reasonable fees and costs will also be awarded.

CONCLUSION

Given these undisputed facts,* we must conclude that no defense exists to the ADEA claim and that the profferred justification for the disparate treatment is mere subterfuge for discrimination. Accordingly, the plaintiffs' motion for summary judgment is granted. The parties are directed to attempt to stipulate to the amount of damages and fees. The case will be referred to United States Magistrate Francis to assist in this process, or in the alternative, if a stipulation cannot be reached, the Magis-

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*The defendants, in a vain attempt to find a disputed issue of material fact which would preclude summary judgment, argue that there is a disputed issue as to whether the plaintiffs are engaged in "off-pier" employment and are thus ineligible for GAI. In support of their argument, defendants submit an affidavit which indicates that "numerous GAI-eligible longshoremen are working outside of the industry in violation of the contract." Brief at 24. However, in response to interrogatories, defendants indicated that "[t]o the best of defendants' knowledge information and belief, at present plaintiffs are qualified and eligible for GAI benefits." Defendants' Response to Plaintiffs' First Set of Interrogatories 28. It appears that at the commencement of this lawsuit each of the plaintiffs was deemed to be qualified for GAI. Moreover, they have since been deposed. The defendants have come forth with no evidence to support their theory that one or more of the plaintiffs may not be qualified. Fed. R. Civ. P. 56(e) requires "specific facts showing that there is a genuine issue for trial." Defendants have produced no such facts. *See, United States* v. *Prince,* 348 F.2d 746 (2d Cir. 1965). Accordingly, we find that there is no genuine issue of material fact in dispute within the meaning of Rule 56. If, however, in the regular course the defendants should discover evidence that the plaintiffs are not otherwise eligible for GAI, nothing in this decision should be read to preclude their disqualification.

trate will make a report and recommendation on damages and fees.

It Is So Ordered.

Dated: New York, New York
January 21, 1986

MARY JOHNSON LOWE
United States District Judge